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No. 02-0010 (H)

IN THE SUPREME COURT OF THE UNITED STATES

GEORGE M. GALAZA, Warden, *Petitioner,*

v.

MICHAEL JEROME POWELL, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioner has contended that the Ninth Circuit failed to follow controlling Supreme Court precedent by finding an instruction that created a mandatory presumption on an element of the offense to be structural error not subject to harmless error analysis. In his Brief in Opposition To Petition For Certiorari, respondent contends that certiorari should not be granted because the Ninth Circuit's decision included an alternate holding based upon based upon *Quercia v. United States*, 289 U.S. 466 (1933). Respondent is mistaken.

Respondent cites no cases establishing that the Ninth Circuit's discussion was an "alternative holding," and a review of this Court's jurisprudence indicates that it was not. Alternative holdings must be clear and we find no indication in the Ninth Circuit's opinion that it considered that discussion to be an alternative holding. See, e.g., *Arkansas v. Sullivan*, 532 U.S. 769, 770 (discussing alternative holding of a state supreme court); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S.72, 206-207 (1999) (discussing an alternative holding in

prior decision); *Clinton v. City of New York*, 524 U.S. 417, 448 (not reaching alternate grounds in district court opinion).

To the contrary, the Ninth Circuit discussed *Quercia* only because the state had argued the trial court's statements did not constitute an instruction, but simply a comment on the testimony.[1/] The Ninth Circuit held that the issue "is more appropriately analyzed under *Carella* [*v. California*, 491 U.S. 263 (1989)] than *Quercia*, which addressed the proper limits on a trial judge's comments to the jury. . . .Accordingly, the trial judge's statement should be assessed under the standards employed in scrutinizing other jury instructions, and *Carella* and *Sandstrom* [*v. Montana*, 422 U.S. 510 (1979), rather than *Quercia*, constitute the correct controlling authority." *Powell v. Galaza*, 282 F.3d 1089, 1097 (9th Cir. 2002). Thus, the Ninth Circuit actually rejected the applicability of *Quercia* to this case.

The Ninth Circuit did find that the trial court's statements were "also erroneous under *Quercia* and its progeny." *Powell*, 282 F.2d at 1097. However, it found only that the statements were "impermissible" under *Quercia*. Id. at 1098.

That the Ninth Circuit did not intend for its *Quercia* discussion to constitute an alternate holding on the structural error issue is most clearly seen because it did not follow that discussion with any error analysis. See, in. gen. *Arizona v. Fulminate*, 499 U.S. 279; *Powell, supra*, 282 F.3d at 1089. Thus, at most, the Ninth Circuit reached an alternate holding on whether the trial court's comments constituted error at all – which is not at issue in this request for certiorari.

The Ninth Circuit's decision clearly turned upon *Carella v. California*, 491 U.S. 263 (1989) and *Sandstrom v. Montana*, 442 U.S. 510 (1979) and its holding was that those cases

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1. The district court so held and found the comments were not prejudicial.

necessitated reversal. First, the Ninth Circuit stated those decisions "provide the controlling authority here." *Powell, supra,* 282 F.3d at pp. 1094-1095. Second, the Ninth Circuit found that the California Court of Appeal failed to cite those cases so that that court's decision was contrary to controlling precedent. *Id.* at p. 1095. Finally, the Ninth Circuit concluded its decision by vacating respondent's conviction solely on the basis of *Carella/Sandstrom* error, which it found to be reversible per se. *Id.* at pp. 1098-1099. Thus, because the Ninth Circuit reversed solely on that basis, the case may not be affirmed on the basis of an alternative holding that the Ninth Circuit did not make.

CONCLUSION

For the above reasons and those set forth in the petition certiorari should be granted.

Dated: October 2, 2002

Respectfully submitted,

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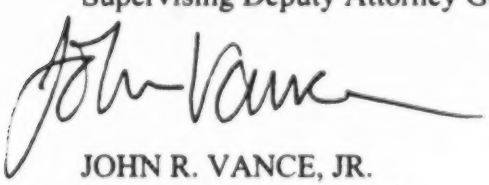

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